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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 338

DAVID H. JENNINGS, Receiver of the National Bank of America, and NATIONAL BANK OF AMERICA,
Petitioners,
v.
UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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I.

OPINION.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 71 Fed. (2d) 618, and also appears at Record pages 46-54. That of the District Court appears in 4 Fed. Supp. 569, and at Record pages 27-30.

II.

JURISDICTION.

It appears that jurisdiction exists in the Supreme Court to entertain the petition for certiorari. The suit pertains to the winding up of the affairs of an insolvent national bank (*Larabee Flour Mills v. First Nat. Bank* (8 C. C. A.), 13 Fed. (2d) 330), and was within the jurisdiction of the District Court to decide. Judicial Code, Sec. 24, par. 16; 28 U. S. C. A. 41 (16). The Circuit Court of Appeals had jurisdiction of the appeal. Judicial Code, Sec. 128 (a); 28 U S. C. A. Sec. 225 (a). The petition for certiorari was filed (August 31) within three months after final judgment (June 4, 1934), and the Supreme Court has jurisdiction to entertain the petition. Sec. 240 (a) Judicial Code; 28 U. S. C. A. Sec. 347.

III.

STATEMENT OF CASE.

The suit was brought by Respondent against the petitioning receiver of National Bank of A..erica, doing business at Gary, Indiana, and the bank, and it is in substance a suit in equity for the separation and payment from the cash in the receiver's possession of an amount equal to the amount of the proceeds of a check owned by Respondent and collected and held in trust by the bank as agent for Respondent.

It is not a suit seeking preferential payment of a debt out of assets of the bank, but instead it is one to recover that which is not an asset of the bank but which belongs to Respondent as the bank's principal. The relationship of debtor and creditor did not exist between them.

Neither is the suit predicated on the preference provisions contained in Sec. 13 of the Indiana Bank Collection Code to which the petition and supporting brief make reference. Only that part of the state statute is relied on which applied to the bank while acting as a collecting bank in this transaction and which fixed the relations of the parties toward each other and toward the item and the proceeds collected thereon. On the basis of those relations thus fixed, the right to recover is further predicated on well-established principles of equity recognized and enforced in such cases by Federal Courts.

The proceeds of Respondent's check were collected, received and held by National Bank of America, and are now held by its receiver, under the circumstances (R. 16-26) following:

Respondent, United States Fidelity and Guaranty Company, became the owner on December 30, 1931, at Indianapolis, Indiana, of a check for $2,196.89 drawn on a Gary, Indiana, bank, and on that day deposited it in its Indianapolis bank for collection. The next day National Bank of America, at Gary, received the check from Fletcher American National Bank of Indianapolis for collection and remittance.

The Uniform Bank Collection Code was then in force in Indiana. Sec. 3861.1 et seq. Burns' Ann. Ind. Stat., Supp. of 1929. By its terms (Sec. 3861.1) this statute applied to all banks in the State. Under its provisions (unless otherwise agreed, which was not done) National Bank of America as the last bank receiving the item for collection became subagent of the depositor (Respondent), and the statute gave it authority as such agent collecting bank (Sec. 3861.9),

without becoming a debtor to Respondent, to receive in lieu of money for the check payment in such form as was customary in the local clearing house, including checks upon itself which the drawee bank might present in the clearings.

National Bank of America collected Respondent's check on December 31st, 1931, through the Gary Clearing House, and in payment therefor received checks drawn on itself, which the bank upon which Respondent's item was drawn presented at the clearings. This check was then charged to the drawer's account and delivered up as a cancelled check.

After the collection was so made by National Bank of America, it, on the same day, drew its draft on a Chicago correspondent and mailed it to the forwarding bank at Indianapolis, which in turn mailed the draft to the Chicago bank for payment. National Bank of America having failed to open on the morning of January 4, 1932, and the draft arriving at Chicago later that day, payment of the draft was refused. The draft has been returned to the receiver.

The cash and cash items in possession of National Bank of America, and later in possession of the receiver, have at all times exceeded, and now exceed, the amount of the proceeds from Respondent's check. Respondent has received nothing on the check and has sustained a charge-back of the credit received at the time of deposit for collection.

The facts were specially found by the District Court, and the conclusions of law and decree were in Respondent's favor. The Circuit Court of Appeals affirmed, except as to interest on the amount.

IV.

SUMMARY OF ARGUMENT.

PROPOSITION I.

No valid reason for allowance of the writ is shown.

Point 1.

The decision, decree, and opinion of the Circuit Court of Appeals are not in conflict with any decisions, or principles established in decisions, of the Supreme Court, but are in harmony therewith.

(a) In no case has the Supreme Court held that a transaction by a national bank, such as the collection by it of an item for another is immune from effect of such state laws as the Indiana Bank Collection Code. On the contrary, the Supreme Court did on the very day of the decision by the Circuit Court of Appeals (June 4, 1934) reaffirm and apply the principle that transactions by national banks are subject to State laws which do not interfere with the functions of such banks as agencies of government and which do not conflict with Federal law. *Lewis v. Fidelity and Deposit Company*, 54 Sup. Ct. Rep. 848, 851. The principle that national banks are controlled by state laws in most of their transactions has long been established by the decisions of this Court. *McClellan v. Finch*, 164 U. S. 347, 356, 357.

State statutes governing collections by banks do apply to national banks so as to fix their relations to the items and to their owners. *Federal Reserve Bank v. Malloy*, 264 U. S. 160, 164.

(b) Nor is the decision in conflict with any decision of the Supreme Court in that it awards to the owner the proceeds of a collected item held in trust for him by the bank. In *Capital National Bank of Lincoln v. First National Bank, and MacFarland, Receiver*, 172 U. S. 425, 433, this Court said it knows of no provision of the banking act which assumes to appropriate trust funds in the possession of insolvent banks. To the same effect is *Scott v. Armstrong*, 46 U. S. 499, 510.

Point 2.

Neither is the decision in conflict with decisions of other circuits when proper distinctions are observed. It is true that there are decisions in other circuits which hold that the basis for a trust fails when an item received for collection is misused to pay the bank's own debts to, or through, a clearing house and the clearing house balance is against the bank. But those decisions were made without reference to the effect of the Uniform Bank Collection Code, which now authorizes the agent bank to collect through a clearing house and to receive in payment, in lieu of money, any customary settlement at a local clearing house, and which gives an entirely different legal effect to such a transaction than the Courts gave it in the absence of such authority.

Point 3.

The decision and opinion of the Circuit Court of Appeals observe the rule as to augmentation and tracing, and finds the rule satisfied under the facts in the light of the effect of the provisions of the Uniform Bank Collection Code which entered into the transaction. The decision in this respect is not against weight

of authority but is in harmony with the authorities requiring a showing of augmentation and tracing. Other Courts not having had occasion to consider the effect of the Uniform Bank Collection Code as affecting the question of whether augmentation and tracing exist under such facts as shown in the record, it cannot fairly be said that the decision is against any authority, much less against the weight of authority.

PROPOSITION II.

The case was correctly decided, and the opinion of the Circuit Court of Appeals is lucid and complete on all points involved.

Point 1.

Contracts of National banks are generally governed and construed by state laws, and their property rights are also based on state law.

McClellan v. Chipman, 164 U. S. 347, 356, 357;
Lewis v. Fidelity and Deposit Company (1934), 54 Sup. Ct. Rep. 848, 851.

State statutes governing collections of items by banks enter into such transactions and determine the relations, authority and rights of national, as well as state banks.

Federal Reserve Bank v. Malloy, 264 U. S. 160, 162, 164.

Point 2.

It not having been otherwise provided by agreement, and Respondent's check having been deposited

for collection only, National Bank of America was Respondent's sub-agent for the collection of the check and for remittance of the proceeds in virtue of provisions of state law.

Sections 1-2, Uniform Bank Collection Code, ch. 164, Indiana Acts of 1929;
Sections 3861.1-3861.2, Vol. IV, Burns' Ann. Ind. Stat. 1929 Supp.

Point 3.

By the contract made, into which the provisions of said state law entered and formed a part, National Bank of America as "agent collecting bank" was authorized to receive "*in payment*" of Respondent's check "without becoming responsible as debtor therefor," in lieu of money, the exchanged checks drawn on it and presented to it through the clearing house by Gary State Bank.

Sec. 9, Ch. 164, Indiana Acts 1929;
Sec. 3861.9, Vol. IV, Burns' Ann. Ind. Stat., 1929 Supp.

In the absence of statutory authority to receive payment in that manner and form, National Bank of America would have had authority to receive in payment only legal tender money.

Federal Reserve Bank v. Malloy, 264 U. S. 160, 165.

Point 4.

Payment for Respondent's item having been received by National Bank of America in said manner and form, it did not become responsible as debtor there-

for and it remained Respondent's sub-agent in respect thereto. Under the agreed facts, the proviso in Sec. 9 did not apply.

Sec. 9, Ch. 164, Indiana Acts of 1929;
Sec. 3861.9, Vol. IV, Burns' Ann. Ind. Stat., 1929 Supp.

Point 5.

The fiducial relation of National Bank of America to the proceeds of Respondent's check was not changed by the abortive effort to remit by draft on Chicago, in that the draft did not constitute an unconditional credit requested or accepted by Fletcher American National.

Sec. 10, Ch. 164, Indiana Acts of 1929;
Sec. 3861.10, Vol. IV, Burns' Ann. Ind. Stat., 1929 Supp.,

and in that the unpaid draft (later returned to the receiver) did not constitute payment by National Bank of America.

Jefferson Standard Life Ins. Co. v. Wisdom, (5th C. C. A.) 58 Fed. (2nd) 565, 566.

Point 6.

The proceeds of Respondent's check (in the form of checks drawn on the collecting bank) were the same as cash to the collecting bank, and when it retained an amount in cash and cash items equal to the amount of said proceeds which it otherwise would have paid out (R. 23) there was in legal effect a substitution of that amount of cash and cash items for the amount of said proceeds in their first form, and the collecting

bank remained a fiduciary toward said proceeds in their substituted form (Sec. 9 of said Code). In that situation true augmentation of the cash and cash items held by the collecting bank is shown, for they were greater by the amount thus collected as a direct result of the collection.

Ellerbe v. Studebaker Corp. of Am. (4th C. C. A.) 21 Fed. (2d) 993, 996, 997;
Schumacher v. Harriett (4th C. C. A.) 52 Fed. (2d) 817, 819, 820

Point 7.

It appearing that $2,196.89 in amount of the collecting bank's cash and cash items were in legal effect substituted for the checks lawfully received from Gary State Bank in payment for Respondent's check, the collecting bank remained a fiduciary in respect to that amount and equity will, under modern rule, in a proper proceeding segregate said proceeds *in amount* from the aggregate of said cash and cash items if the aggregate in the receiver's hands includes said amount.

Ellerbe v. Studebaker Corp. of Am. (4th C. C. A.), 21 Fed. (2d) 993, 996, 997.

Point 8.

Said cash and cash items having at all times remained in excess of the amount of said proceeds held in trust, the trust fund is clearly traced into the receiver's hands, under the presumption that whatever may have been paid out was paid out of the bank's own.

Peoples Nat. Bank v. Moore (8th C. C. A.), 25 Fed. (2d) 599, 601;

Schumacher v. Harriett (4th C. C. A.), 52 Fed. (2d) 817, 818.

Point 9.

The receiver took said cash and cash items subject to the trust therein in Respondent's favor to the amount of said proceeds from said check, and to the extent of the amount of said proceeds said cash and cash items do not constitute assets of the bank for ratable distribution, but that amount thereof belongs to Respondent and the decree properly separates that amount and orders it paid to Respondent.

Capital Natl. Bank v. First Natl. Bank of Cadiz, 172 U. S. 425, 433;

Ellerbe v. Studebaker Corp. of Am. (4th C. C. A.), 21 Fed. (2d) 993, 997;

Peoples Natl. Bank v. Moore (8th C. C. A.), 25 Fed. (2d) 599, 601;

Jefferson Standard Life Ins. Co. v. Wisdom (5th C. C. A.), 58 Fed. (2d) 565, 566;

Scott v. Armstrong, 146 U. S. 499, 510.

ARGUMENT.

THERE IS NO CONFLICT IN DECISIONS.

There is no conflict between the decision of the Circuit Court of Appeals in this case and decisions of either the Supreme Court or of other Circuit Courts of Appeal. Instead, they are in harmony.

The decision in no wise conflicts with Federal law governing distribution of assets of failed national banks, nor does it give effect to any state law which conflicts with Federal law. The decision is not predicated on any preference provisions contained in Sec. 13 of the Indiana Bank Collection Code. The decision does recognize the effect of those provisions in said Code which govern the collection transaction in question and which operated to fix the agency and trust relationships of the bank toward the owner and toward the item and the proceeds therefrom. And in view of those relationships, the decision favors recovery by Respondent after the court first found that the cash and cash items in the bank's possession were augmented by the proceeds and that, the amount of such cash and cash items not having at any time fallen below the amount of such proceeds, those proceeds are now among the cash and cash items held by the receiver under the presumption that the amount held in trust by the bank was kept sacred and is being held by the receiver subject to the trust. Thus, what the decision awards to Respondent is not an asset of the bank, but it belongs to Respondent.

The provisions in the Indiana Bank Collection Code which, under the facts, defined the bank as Respond-

ent's subagent (Sec. 3861.2, Burns' Ann. Ind. Stat., 1929 Supp.), and which (Sec. 3861.9, id.) authorized it as such agent to collect the item for Respondent and, *without becoming responsible as debtor*, to receive, in lieu of money, payment in such form as was customary at the local clearing house, including checks upon itself, clearly were not in derogation of the bank's functions as an agency of government. This was a purely private commercial transaction. Neither do those statutory provisions conflict with any Federal law, for none has been enacted to govern such transactions.

Hence, the provisions of the Indiana statute just referred to did govern the collection transaction and did operate to fix the relationships of the parties thereto toward each other and toward the subject matter of the transaction under authority of *McClellan v. Chipman*, 164 U. S. 347, 356, 357; *Lewis v. Fidelity and Deposit Company* (1934), 54 Sup. Ct. Rep. 848, 851; *Federal Reserve Bank v. Malloy*, 264 U. S. 160, 164. Thus, the point in the decision by the Circuit Court of Appeals that those statutory provisions were applicable is in harmony, rather than in conflict, with the decisions of the Supreme Court.

The point to the decision that trust funds coming in possession of the receiver of a national bank belong to the owner and may not be appropriated to make assets is also recognized in the decisions of the Supreme Court. *Capital Nat. Bank v. First Nat. Bank of Cadiz*, 172 U. S. 425, 433; *Scott v. Armstrong*, 146 U. S. 491, 510.

Nor is there conflict in this decision and those of other circuits when proper distinctions are observed. None of the decisions from other circuits to which Peti-

tioners make reference involved the effect upon such transactions of the applicable provisions contained in the Uniform Bank Collection Code. Some of the cited cases do hold that where a bank receives an item for collection and then misuses it to pay its own obligations at a clearing house and the clearing house balance is against it, the basis for a trust fails. But the Code, where in force, now authorizes agent banks to collect items through clearing houses, and to receive payment in things other than money without the relationship of debtor and creditor arising. The legal effect of such an authorized transaction under the Code is obviously far different than where a bank violates its agency relationship and misuses the item entrusted to it by paying its own debts with the item. When a collection is made, and payment received, in a mode authorized by the Code, as here, there is a valid distinction which prevents conflict between this decision and those made with a view to the general law as it obtains where no such Code is in force. It can, therefore, not fairly be said that this decision conflicts with those from other circuits, or that it is against weight of authority. There seem to be no other decisions in which these code provisions were considered.

The Case Was Correctly Decided.

The Indiana bank collection code does have the effect given it by the decision of the Circuit Court of Appeals. By its terms (Sec. 3861.1, Vol. IV, Burns' Ann. Ind. Stat., 1929 Supp.) it defines "bank" as meaning "any person, firm or corporation engaged in the business of receiving and paying deposits of money within this State." In Section 2, the Act provides that,

unless otherwise agreed, a bank receiving an item on deposit for collection, and all subsequent banks receiving it for that purpose, are agents and subagents, respectively, of *the depositor* (Sec. 3861.2, Vol. IV, Burns' Ann. Ind. Stat. 1929 Supp.). And in Section 3 (same citation), the Act preserves the agency relation notwithstanding certain forms of indorsements.

In virtue of the agreed facts and in virtue of said Sections 1, 2 and 3 of said Act, National Bank of America became the sub-agent of Respondent for the purpose of collecting Respondent's check and for the purpose of remitting therefor. It was an "agent collecting bank" within the meaning of Sec. 9 of said Act (Sec. 3861.9, Vol. IV, Burns' Ann. Ind. Stat., 1929 Supp.).

It is said Section 9, which changed the law from what it was in respect to the authority of such agent collecting banks to receive payment for items in collection in forms other than money without becoming debtor therefor, that Respondent contends has a vital bearing on the question of whether there was true augmentation of the cash and cash items held by National Bank of America after the clearing house transaction of December 31st.

As a matter of general law an agent collecting bank had no authority to receive in payment of the item in collection anything other than legal tender money. *Federal Reserve Bank v. Malloy*, 264 U. S. 160, 165. Much less did an agent bank have authority to use an item entrusted to it for collection for the purpose of paying its own obligations at a clearing house or otherwise. The clearing house cases referred to under Petitioners' Proposition III (pp. 19-22) are

cases where the collecting banks misused the items entrusted to them, and the construction placed on such transactions was that the items were wrongfully used for the payment of their own debts to others.

Sec. 9 of the Uniform Bank Collection Code now legalizes the practice of clearing items held in trust for collection through clearing houses, but the Act places an entirely *different construction* on such transactions than the Courts had given them in the absence of such authority, and gives them an entirely different legal effect.

Whereas, the construction and effect was that an item in collection so used, was wrongfully used as a means of payment of the collecting bank's own debt, and whereas the collecting bank had no authority to receive payment in any form other than money, Section 9 of the Code now authorizes the agent collecting bank to "receive *in payment* of an item without becoming responsible as debtor therefor, whether presented by mail, through the clearing house or over the counter of the drawee or payor, in lieu of money, either (a) * * * or (b) * * * or (c) *such method of settlement as may be customary in a local clearing house or between clearing banks or otherwise.*" Sec. 3861.9, Vol. IV, Burns' Ann. Ind. Stat., 1929 Supp. By proviso to (c) in Sec. 9, it is provided that if the agent collecting bank shall request or accept an unconditional credit which has been given to it on the books of the drawee or payor or on the books of any other bank then the agent bank shall become debtor for the item and responsible therefor as if the "*proceeds*" were actually received by it in money. This did not happen in this case.

Thus, when National Bank of America exchanged Respondent's check on Gary State Bank for checks which the latter held against the former at the clearing house transaction of December 31st, Respondent's check was not, in the eye of of said Sec. 9, used to pay a debt of National Bank of America, but the check was collected by a method expressly authorized in said Sec. 9, and by which the collecting bank *received in payment* the checks upon it which it received in exchange. That which the collecting bank received from Gary State Bank is referred to in the proviso to clause (c) of Sec. 9 as "proceeds." Moreover, since National Bank of America did not request or accept an unconditional credit or for the item on the books of Gary State Bank or on the books of any other bank, it did not become responsible as debtor for either the check or for the "proceeds" of the check.

The "proceeds" thus "received in payment" were the same as cash to the collecting bank, and they were in contemplation of Sec. 9 automatically reflected in the cash and cash items held by the collecting bank after said clearing house transaction, because said cash and cash items became instantly relieved from the obligations of the checks received in exchange to the extent of the amount of Respondent's check. What occurred in legal effect was a substitution of cash and cash items held by National Bank of America to the extent of $2,196.89, in amount, for checks upon it which it received *as agent* in payment of Respondent's check. It is expressly stipulated in the facts (R. 23) that but for said collection of Respondent's check through the local clearing house, National Bank of America would that day *actually have paid* to the clearing house exactly $2,196.89 *more* than it did pay.

Moreover, the obvious reason why the bank did not pay out that additional sum on December 31st was due solely to the fact that Sec. 9 of the code authorized it as Respondent's agent to "receive payment" of the check by such a method as would have that precise effect and to the fact that pursuant to said authority payment of the check was received by such a method.

As to the amount of said proceeds thus involved in the total of the cash and cash items held by the bank after said clearing house settlement of December 31st, National Bank of America was a fiduciary. The bank did not become debtor for said proceeds, but continued to be agent in respect thereof under the facts because of the express provisions of Sec. 9 of said Act.

Hence, there was true augmentation of said cash and cash items by the amount of said proceeds toward which the bank remained a fiduciary. In view of the provisions of said Sec. 9, it was not necessary to support a trust as to said proceeds that there be augmentation in the technical sense of new legal tender money brought into the bank from outside. The checks received in exchange were, however, in a practical sense new money. This is not a case where a bank wrongfully used an item, entrusted to it for collection, to pay its own debt and where the result merely was a decrease in its own debts. It is a case where, pursuant to authority of Sec. 9 of said Code, the bank received "in payment" for Respondent's check other checks upon it and which it in legal contemplation held as proceeds in trust. A necessary result of receiving payment in that form under authority of said Sec. 9 is that a substitution of cash and cash items for the checks received in exchange occurred in legal effect to the extent of

the amount of said proceeds, and the facts are (R. 23) that the collecting bank paid out exactly that much less than it would otherwise have paid. Thereafter, the cash and cash items held by the bank included an amount which was equal to the amount of said proceeds, and as to the amount which represented said proceeds the bank was a fiduciary in respect thereof in virtue of the provisions of said bank collection code. Said cash and cash items were, therefore, greater by the amount of said proceeds as a result of said collection. When that is the result there is true augmentation. *Ellerbe v. Studebaker Corp. of America* (4th C. C. A.), 21 Fed. (2d) 993, 997. In that case the Court used this language:

> "* * * there can be no doubt that as a result of the collection of the draft of complainant, the assets which came into the hands of the receiver were greater by the amount of the collection than they would have been had the collection not been made, and consequently that there was exactly that much more for division among creditors than there would have been otherwise."

The operation and effect of Sec. 9 of the Code in this transaction at once distinguishes this from the cases cited at pages 19-22 of Petitioners' brief to the effect that if the clearing house balance is against the bank which wrongfully uses a check held for collection to pay its own debts there is not augmentation shown. Those cases, and the reasons for the way they are decided, do not control here where the check was not used to pay a debt but where under authority of Sec. 9 of the Code the agent bank "received payment" for the check by receiving in exchange checks drawn upon it.

Where a collection is thus made under express authority of said Code, the accident of which way a clearing house balance may be is immaterial, for in either case the bank, as agent, "receives payment" for the item and comes in possession of "proceeds," within the meaning of said Sec. 9.

Having shown, we think, that the cash and cash items of the collecting bank were truly augmented by the amount of the proceeds from Respondent's check, it remains to be shown that those proceeds are traceable into the cash and cash items now in the receiver's hands. If they are shown to be there, then to the extent of $2,196.89, in amount, the cash and cash items now in the receiver's hands do not constitute assets of the bank and that much does not go to creditors but belongs to Respondent and goes to it. It is only that which belongs to the bank that is required to be distributed ratably to creditors. *Scott v. Armstrong*, 146 U. S. 499, 510; *Capital Nat. Bank of Lincoln v. First Nat. Bank of Cadiz*, 172 U. S. 425, 433; *Jefferson Standard Life Ins. Co. v. Wisdom* (C. C. A.), 58 Fed. (2d) 565, 566.

The abortive effort at remittance by draft did not change the relation of National Bank of America toward said proceeds. On the facts of the case Fletcher American National, as agent, had a right to receive the draft, but did not become debtor therefor (Sec. 3861.10, Vol. IV, Burns' Ann. Ind. Stat., 1929 Supp.). The draft was not paid by Continental and was later returned to appellant receiver. Under such circumstances National Bank of America continued as a fiduciary in respect to said proceeds. *Jefferson Standard Life Ins. Co. v. Wisdom* (C. C. A.), 58 Fed. (2d) 565, 566.

The agreed facts are (R. 26) that the cash and cash items held by the bank after said collection was made never fell below the amount of said proceeds held in trust and that they now exceed that amount. Under modern rule, that sufficiently traces said proceeds into funds in the hands of the receiver so as to entitle Respondent to have a trust declared therefor and to have the amount separated and paid to it. *Ellerbe v. Studebaker, etc.* (4th C. C. A.), 21 Fed. (2d) 993, 996; *Schumacher v. Harriett* (4th C. C. A.), 52 Fed. (2d) 817, 818; *Jefferson Standard Life Ins. Co. v. Wisdom* (5th C. C. A.), 58 Fed. (2d) 565, 566; *Peoples Nat. Bank v. Moore* (8th C. C. A.), 25 Fed. (2d) 599, 601.

Petitioners' contention that segregation of the proceeds of the check by the bank must be shown is erroneous. If those proceeds are traced into the mass of cash items held by the receiver, equity will, under modern rule, order their separation *in amount. Schumacher v. Harriett* (4th C. C. A.), 52 Fed. (2d) 817, 818; *Ellerbe v. Studebaker, etc.* (4th C. C. A.), 21 Fed. (2d) 993, 996.

The case of *Allied Mills, Inc. v. Horton*, 65 Fed. (2d) 708, recently decided by the Circuit Court of Appeals for the Seventh Circuit in which it was held that augmentation did not appear where the collecting bank was also the paying bank, is distinguishable from the instant case. Here, we have another than the collecting bank as payor of the item, and we also have the provisions of the Bank Collection Code entering into the transaction with the effect already shown. It does not appear in the cited case that the collecting bank became fiduciary toward any proceeds received "in payment" of the item. That case obviously does not control this case.

The cases cited by Petitioners' brief do not support their contention that it was error to enjoin the receiver from otherwise using so much of the cash and cash items in his hands as is required to satisfy the decree. The facts and the law show that the amount awarded by the decree belongs to appellee and not to the bank or its receiver. The facts also show (R. 26) that the receiver intends to treat the proceeds of Respondent's check, as embodied in the cash and cash items in his hands, as assets for ratable distribution. That would be a wrongful use of what belongs to Respondent, and it obviously was proper to enjoin the receiver from misusing that which he holds for Respondent. The order does not preclude distribution of any assets belonging to the bank.

The equities are clearly with Respondent. The bank collected Respondent's check as agent and continued as such in respect to the proceeds. The collection was made on about the last day the bank was open for business. Those proceeds belonged not to the bank, but to Respondent. The bank's creditors have no just claim to what the bank thus held as agent for Respondent. The decree only awards to Respondent what it was intended to get from its agent.

It is respectfully submitted that the writ of certiorari should not be allowed.

Respectfully submitted,

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APPENDIX.

Pertinent Parts of Uniform Bank Collection Code, Ch. 164 Indiana Acts of 1929.

"Banks—Collection and Payment of Checks, Other Instruments—Definitions.

Section 1. Be it enacted by the general assembly of the State of Indiana, That for the purposes of this code:

(a) The term "bank" shall include any person, firm or corporation engaged in the business of receiving and paying deposits of money within this state. A branch or office of any such bank shall be deemed a bank for the purpose of this act.

(b) The term "item" means any check, note or other instrument providing for the payment of money.

Agency Relationship to Depositor of Collecting Banks.

Section 2. Except as otherwise provided by agreement and except as to subsequent holders of a negotiable instrument payable to bearer or indorsed specially or in blank, where an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be subagent of the depositor but shall be authorized to follow the instructions of its immediate forwarding bank and any credit given by any such agent or subagent bank therefor shall be revocable until such time as the proceeds are received in actual money or an unconditional credit given on the books of another bank, which such agent has requested or accepted. Where any such bank allows any

revocable credit for an item to be withdrawn, such agency relation shall nevertheless continue except the bank shall have all the rights of an owner thereof against prior and subsequent parties to the extent of the amount withdrawn."

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Section 4. (This section construes endorsements so as not to alter agency relations.)

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"What May be Received in Payment Without Responsibility.

Section 9. Where ordinary care is exercised, any agent collecting bank may receive in payment of an item without becoming responsible as debtor therefor, whether presented by mail, through the clearing house or over the counter of the drawee or payor, in lieu of money, either (a) the check or draft of the drawee or payor upon another bank or (b) the check or draft of any other bank upon any bank other than the drawee or payor of the item or (c) such method of settlement as may be customary in a local clearing house or between clearing banks or otherwise: Provided, That whenever such agent collecting bank shall request or accept in payment an unconditional credit which has been given to it on the books of the drawee or payor or on the books of any other bank, such agent collecting bank shall become debtor for such item and shall be responsible therefor as if the proceeds were actually received by it in money.

Acceptance of Settlement from Subsequent Bank in Chain.

Section 10. Where ordinary care is exercised, any agent collecting bank may receive from any subsequent bank in the chain of collection in remittance for an item which has been paid, in lieu of money, the check or draft of the remitting bank upon any bank other than itself or the drawee or payor of the item or such other method of settlement as may be customary: Provided, That whenever such agent collecting bank shall request or accept an unconditional credit which has been given to it on the books of the remitting bank or on the books of any other bank, such agent collecting bank shall become debtor for such item and shall be responsible therefor as if the proceeds were actually received by it in money."